Supreme Court of the United States

October Term, 1960

No. 940

KINOSHITA & CO., LTD., TOKYO,
Petitioner,

v.

LIBERTY NAVIGATION & TRADING CO., INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This brief is submitted in behalf of respondent, Liberty Navigation & Trading Co., Inc., in opposition to the petition for a writ of certiorari to review a judgment of The United States Court of Appeals for the Second Circuit which awarded respondent $73,635.68 with interest as damages for petitioner's breach of a charter contract. Petitioner admitted liability and the only issue before the courts below was the method of computing damages.

There is no reason for this Court to grant a writ of certiorari in this case. None of the requirements set forth in Rule 19, Supreme Court Rules is satisfied. The courts below unanimously applied to the facts of this case a rule of damages which is eminently correct and beyond serious dispute. Chief Judge Lumbard

concurred with the majority on the law but differed only on the computation of damages and only to the extent of $5,000.* Certainly this Court need not concern itself with the arithmetic of this particular case where all the judges below agreed on the applicable rule of damages and where there is no conflict with the decisions of any other court.

Statement of the Case

The Court of Appeals unanimously affirmed the District Court's decision with regard to the law of damages which governed this case, but modified the amount awarded by reducing it from $68,640 to $73,635.68. Chief Judge Lumbard would have awarded respondent $68,635.69.

The rule of damages applied by both courts below was stated by the Court of Appeals as follows:

> ". . . . The damages which the law accords to the plaintiff are the value of the defendant's performance less the plaintiff's saving from being relieved of the necessity of performing on his own part. . . ." (Appendix to Petition, p. 5a)

The facts to which this rule was applied, and as found below, were as follows:**

1. After petitioner breached the charter and refused to accept the ship under any circumstances, there

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* "I am in full agreement with all of Judge Friendly's opinion for the majority except for that section which recomputes the damages to be assessed against the defendants." (Appendix to Petition, p. 12a).

** The District Court's decision is in Appellant's Appendix at 3a et seq., and its findings of fact are at pp. 4-5a. Appellant's Appendix and the Appendix for Appellee, filed in the Court of Appeals are also filed in this Court.

were no charters available on the open market. Respondent, however, was able to obtain a substitute charter through private channels which resulted in a net loss. Respondent accepted this charter because it was the only one it could get; not because respondent wished to return the ship to the United States as petitioner claims (Appendix for Appellee, pp. 5-6, 22).

2. The Josefina, like any other ship, incurred costs whether chartered or not. Certain fixed costs—such as wages, food, stores, repairs, etc.—were continuing charges, necessarily incurred to keep the ship ready to perform any charters obtained for it. These fixed costs, unrelated to the performance of any particular charter, would have been incurred whether the ship performed the cancelled charter, the substitute charter or was forced to remain idle in port after the breach waiting for a cargo.

3. When a ship performs a charter, additional voyage expenses are incurred which pertain only to that specific voyage. The additional voyage expenses respondent would have incurred to perform the cancelled charter were fuel at sea, commissions, port charges and dunnage.

4. If petitioner had not breached the charter, respondent would have received a freight payment of $121,740. That payment would have been more than enough to pay respondent's fixed costs and the additional voyage expenses. Because of the breach, respondent did not receive the $121,740 and thus received no funds with which to pay its fixed costs which had to be paid nevertheless. In mitigation, respondent did

not incur the additional voyage expenses. Also the substitute voyage, although resulting in a net loss to respondent, made some contribution to the fixed costs, since at least some money was received as freight during the period the vessel would have been chartered to petitioner.

The District Court computed damages by deducting from the gross freight the additional voyage expenses not incurred. It did not consider the substitute charter since the parties had stipulated it resulted in a loss. Petitioner had also objected to the admission of any evidence about the substitute charter on the ground it in no way mitigated damages (Appendix for Appellee, p. 4).

The Court of Appeals modified the judgment by deducting the contribution made towards payment of the fixed costs by the substitute charter as well as the voyage expenses not incurred, a difference of a little more than $19,000. Thus, respondent was indemnified for its actual losses and put in the same position as if petitioner had performed the contract rather than breached it.

I. Petitioner's Claims that the Decision Below is in Conflict With Decisions of This Court and Other Courts of Appeal and Has Unsettled Established Rules of Damages Are Without Merit and the Petition Should be Denied.

Petitioner here reargues its contention made four times below and four times rejected, twice by the District Court and twice by the Court of Appeals—on original argument and on petition for a rehearing in both courts. Both the District Court and the Court

of Appeals found no merit to petitioner's legal arguments, the Court of Appeals stating:

> " . . . Defendant [petitioner] has cited no authority to support the rule of limitation which it advances. Indeed, in one of the decisions relied on by it, United Transportation Co. v. Berwind-White Coal-Mining Co., 13 F. 2d 282 (2d Cir. 1926), this Court sanctioned a measure of damages more liberal to the owner. . . ." (Appendix to Petition, p. 5).

A brief analysis of petitioner's contentions indicates why the courts below so consistently and unanimously rejected them. Petitioner contends that respondent is entitled to recover only the estimated "profits" on the cancelled charter regardless of any other damages respondent might have suffered. Petitioner rejects the time honored rule that damages should make the injured party whole. Instead, petitioner seeks to apply an inflexible rule without regard to the purpose of the law of damages or the particular facts of this case.

Petitioner's theory of damages would lead to grossly inequitable consequences. It gives a charterer complete freedom to cancel a charter if he believes the owner would break-even or lose money on it. Petitioner's theory would, as stated by the Court of Appeals, "provide an incentive for the breach of voyage charters when the market had fallen so that owners were offering charters at less than full costs." (Appendix to Petition, p. 5). Thus, when charter rates are low in a depressed market, with owners accepting break-even or loss charters to keep their ships running, the charterer could cancel the contract without fear of damages if he found a cheaper freight rate elsewhere.

CONCLUSION

For the reasons stated above, this is not an appropriate case for certiorari and the petition should be denied.

Respectfully submitted,

JOHN V. LINDSAY
One Rockefeller Plaza
New York 20, N. Y.
Attorney for Respondent.

WEBSTER SHEFFIELD FLEISCHMANN
HITCHCOCK & CHRYSTIE
DONALD J. COHN
Of Counsel.